Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Annual Assessment of the Status of	)	MB Docket No. 03-172
Competition in the Market for the	)	
Delivery of Video Programming	)	

COMMENTS OF RCN CORPORATION

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September 11, 2003

SUMMARY

RCN Corporation ("RCN"), the nation's first and largest broadband overbuilder supplying voice, data, and video signals to residential subscribers over its own state-of-the-art fiber optic and coaxial network, is pleased to provide these comments for the Commission's tenth annual assessment of the status of competition in the multi-channel video programming distribution ("MVPD") market. This Tenth Annual Report indeed represents a landmark for competition in the MVPD industry, as does the upcoming seventh anniversary of the Telecommunications Act of 1996, for the inception of competition in all facets of the telecommunications marketplace. There are notable achievements, such as RCN's continued vitality as a competitive provider of bundled voice, data, and video services, the development of innovative technology and broadband services its presence has inspired, and the consumer choice that has resulted. There also continue to be, however, barriers to competition that must be addressed if MVPD competition is to flourish.

In past years, RCN and other competitive overbuilders have raised, and the Commission in its annual reports has noted, significant impediments to competition in the MVPD market, including: (1) denial of access to essential programming; (2) discriminatory and predatory pricing by incumbent cable operators; and (3) discriminatory access to critical infrastructure such as poles, ducts, conduits, and wiring in multiple tenant buildings. These impediments persist and, in many ways, have become more pernicious, as over the last decade, and especially in most recent years, there has been an increase in consolidation and clustering in the MVPD market.

In its comments in previous years, RCN has provided the Commission with detailed information regarding its innovative products and services, the progress of its business plan, the beneficial effects of consumer choice, and specific competitive challenges the Company has faced. For this Tenth Annual Report, with its retrospective view, RCN references back to its

prior filings with the Commission, and offers its thoughts on the current state of the MVPD marketplace and the regulatory strategies that the FCC must undertake to ensure the future of MVPD competition. Specifically, RCN urges the Commission to consider pursuing specific regulatory solutions to the continuing barriers to market entry posed by denial of access to critical video programming, predatory and discriminatory pricing tactics by incumbents, and problems with access to infrastructure and MDUs, as detailed herein. The Commission must also consider the impact that the increase in consolidation and clustering has had on these issues and take appropriate action, such as the imposition of conditions on proposed mergers and acquisitions between the large players in the MVPD market, that will ensure a competitor's entry and staying power in a market is not blocked by these barriers to competition.

A pro-active stance by the FCC is especially critical given the current market conditions. The investment capital available to fund the growth of competition, plentiful just a few years ago, has all but vanished. For the investment community to reenter the telecommunications market and to sustain its participation over the long haul – as will be necessary in order for multimodal MVPD competition to firmly take root, spread, and flourish – investors must be persuaded that there will be a stable, predictable regulatory environment, facilitating a fair, open, and nondiscriminatory marketplace. This, in turn, requires regulation that recognizes and responds to the inherent advantage enjoyed by the incumbent, historical monopoly providers, against whom new entrants like RCN must compete. Not until all competitors in the marketplace have equivalent opportunities to access and serve consumers, will the full promise of cable competition be achieved.

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Pursuant to the Notice of Inquiry ("NOI") released by the Commission in the above-captioned matter on July 30, 2003,[1] RCN Corporation ("RCN"), by the undersigned counsel, hereby submits its Initial Comments in this proceeding.

I. INTRODUCTION

A. RCN Corporation

RCN, through its affiliates, is the nation's largest terrestrial cable overbuilder. RCN has constructed its own facilities-based broadband distribution network in the Boston, New York, Philadelphia/Lehigh Valley, Chicago, San Francisco, Los Angeles and Washington, D.C. metropolitan markets. RCN offers subscribers a bundled package of local and long distance telephone services, high-speed Internet access and cable and OVS broadband distribution services, including High Definition Television (HDTV) and video-on-demand. RCN has been instrumental in introducing competition into the local telephone market, especially for residential customers, and has been at the forefront of providing an alternative to the incumbent cable operators. Without a doubt, RCN's presence in these markets is a benefit to consumers, resulting

[1] In the Matter of Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming, *Notice of Inquiry*, MB Dkt. No. 03-172, FCC 03-185, rel. July 30, 2003.

in lower prices, improved customer service, and the innovation and introduction of new services. The Commission has acknowledged the benefits of the competition that broadband service providers, such as RCN, can provide: "[C]ompetition often results in lower prices, additional channels, improved services, or additional non-video services."[2] Indeed, RCN is precisely the type of competitor Congress envisioned when it opened the broadband market to competition through passage of the Telecommunications Act of 1996.

B. Challenges to MVPD Competition

In its pleadings filed in previous years, RCN has provided the Commission with detailed information on the barriers to competition that RCN has faced over the years as a new entrant in the MVPD market.[3] These obstacles to competition include, among others: (1) denial of access to key programming; (2) predatory and discriminatory pricing by incumbents; (3) restrictions on physical access to MDUs; (4) difficulty in securing rights-of-way and franchises on reasonable terms and conditions; and (5) the pervasive efforts of the cable incumbents to block or burden

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[2] Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, *Seventh Annual Report*, 16 FCC Rcd 6005, ¶ 39 (2001).

[3] *See e.g.*, Comments of Residential Communications Network, Inc., dated July 19, 1996, in CS Docket No. 96-133 (Third Annual Report); Reply Comments of RCN Telecom Services, Inc., dated Aug. 20, 1997 (Fourth Annual Report); Comments of RCN Telecom Services, Inc., dated July 13, 1998, and Reply Comments of RCN Telecom Services, Inc., dated Aug. 31, 1998, in CS Docket No. 98-102 (Fifth Annual Report); Comments of RCN Corporation, dated Aug. 6, 1999, and Reply Comments of RCN Corporation, dated Sept. 1, 1999, in CS Docket No. 99-230 (Sixth Annual Report); Comments of RCN Corporation, dated Sept. 8, 2000, and Reply Comments of RCN Corporation, dated Sept. 28, 2000, in CS Docket No. 00-132 (Seventh Annual Report); Initial Comments of RCN Telecom Services., Inc., dated Dec. 3, 2001, and Reply Comments of RCN Telecom Services, Inc., dated January 7, 2002, in CS Docket 01-290 (Eighth Annual Report); see also Initial Comments of RCN Telecom Services., Inc., dated January 4, 2002, in CS Docket 98-82 (Cable Attribution Proceeding); Petition of RCN Telecom Services, Inc. to Deny Applications or Condition Consent, dated April 29, 2002, in MB Docket No. 02-70 (AT&T/Comcast Merger); Comments of RCN Telecom Services, Inc., dated June 16, 2003, in MB Docket No. 03-124 (Hughes/News Corp. Merger).

competitors' access to the market in still other ways.[4] Regrettably, RCN must report that all of these problems persist today. The most important of these market entry obstacles is the inability of competitors to secure essential programming and other crucial inputs, such as video-on-demand hardware, software, and content. For an MVPD competitor, while financing and technology are important, the key to success is to have attractive programming, presented in the format that consumers desire. Absent reliable, non-discriminatory access to content, competitive providers face an enormous, potentially insurmountable, barrier to market entry that deters both customers and investors alike.

Another problem, equally detrimental to competition, is predatory and discriminatory pricing practices by the incumbent cable operators, specifically targeted against broadband providers and clearly intended to undercut their market entry. In the past several years, RCN has experienced a sharp increase in the frequency and aggressiveness of campaigns by the incumbent cable operator to thwart RCN's market entry by offering discriminatory, and often secretive, deep discounts targeted only to RCN's subscribers and potential customer base, while the incumbent's subscribers in non-competitive areas continue to experience dramatic cable rate increases.

Another longstanding and ongoing barrier to competitive entry is the difficulty competitors face in accessing essential infrastructures, including utility poles for the attachment of RCN's wires, and wiring in multi-tenant buildings ("MDUs"). Although Congress amended the Communications Act in 1996 specifically to compel pole-owning utilities to make space available on their poles on non-discriminatory and just and reasonable terms, RCN has faced significant obstacles in its attempt to secure non-discriminatory access to poles in the Boston

[4] *Seventh Annual Report*, *supra* n.2, ¶¶ 11-33.

and Philadelphia regions on just and reasonable terms.[5] As described in past comments, RCN has also experienced extreme difficulty in gaining access to wiring in MDUs in various markets.

Finally, RCN is experiencing an increase in other anti-competitive actions by cable incumbents. For example, there has been a rise in the number of customer service disruptions due to cable line cuts and what appears to be unlawful tampering of its customer premises equipment by incumbent cable operator technicians. Although the incumbent cable operators deny any intent in such actions, the evidence indicates that these were not simply inadvertent incidences.

Although MVPD competition is gradually taking hold, incumbent cable companies continue to dominate an overwhelming share of the MVPD market, and hold monopolies on cable services in all but the few jurisdictions where an overbuilder, such as RCN, operates. Moreover, the cable segment of the market has become more concentrated, with the 10 largest multiple system operators ("MSO's") now serving approximately 85% of cable subscribers.[6] The merger of AT&T Broadband with Comcast, approved by the Commission last year, accelerated and reinforced this trend. The largest three MSOs, of which Comcast is the largest, now control more than 50% of cable subscribers.[7] Concurrently, the regional clustering of cable systems has increased dramatically in the past several years. RCN's experience with clustering in the Boston, New York, Philadelphia suburban and Washington DC. metropolitan areas demonstrates that concentration of cable ownership is driven principally by the incumbent's desire to reinforce dominance in a particular market. The clustering of incumbent systems in the

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[5] *See, e.g., RCN Telecom Services of Philadelphia, Inc. v. PECO Energy Co. and Exelon Infrastructure Services*, PA No. 01-003.

[6] Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, *Ninth Annual Report*, 17 FCC Rcd 26901, ¶ 115 (2001).

[7] NCTA Industry Overview, http://www.ncta.com/industry_overview/top50mso.cfm.

hands of a single, dominant MSO typically has been followed, in particular, by the problems with program access and discriminatory pricing described herein.

C. Competition Benefits Consumers, and Must Be Preserved

The Commission recognizes that competition works, despite the impediments faced by competitors, and has so acknowledged in prior annual reports on the status of competition in the MVPD market.[8] As stated by the FCC, "Generally, we find that in communities where head-to-head competition is present, the incumbent cable operator has responded to competitive entry in a variety of ways, such as lowering prices, providing additional channels at the same monthly rate, improving customer service, adding new services including high speed Internet and telephone services, or by challenging the legality of the entrant's activities."[9] These observations are borne out by RCN's experience in a variety of markets, and by independent consumer advocacy groups. For example, the comprehensive report by the U.S. Public Interest Research Group released in August 2003 ("USPIRG Report") states that: "Cable price increases have been restrained by competition only when a wireline competitor, often referred to as an overbuilder, enters a market to challenge the incumbent. Where such overbuilder competition exists, the effect is dramatic: The GAO reports that cable rates are 17% lower where there is an overbuilder in a franchise area."[10] The FCC's own findings also support the conclusion that the presence of an overbuilder in the market is one of the few factors that acts as a check on cable rate increases:

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[8] *See, e.g.*, Assessment of the Status of Competition in Markets for the Delivery of Video Programming, *Fourth Annual Report*, 13 FCC Rcd 1034 (1998), ¶¶ 131-132; Fifth Annual Report, 13 FCC Rcd 24284, ¶¶ 121 and 136-137; Sixth Annual Report, 15 FCC Rcd 978, ¶¶129-133; *Seventh Annual Report*, *supra* n.2, ¶ ¶ 213-238.

[9] *Seventh Annual Report*, *supra* n.2, ¶ 213.

[10] The Failure of Cable Deregulation: A Blueprint for Creating a Competitive, Pro-Consumer Cable Television Marketplace, U.S. Public Interest Research Group, August 2003, at 1

> As of [July 1, 2002], cable operators facing competition were charging, on average, $37.84 while operators not facing competition were charging $40.26. The difference in average monthly rates between the competitive and noncompetitive groups (the "competitive differential") was 6.4% for 2002, close to the 5-year average differential of 6.5%. On a per channel basis, competitive and noncompetitive cable operators, respectively, charged 63.7 cents and 66.6 cents per channel as of July 1, 2002, a differential in average monthly rate per channel of 4.6%.[11]

Congress, in enacting the Telecommunications Act of 1996, gave the FCC a clear mandate to foster competition in the MVPD market. Moreover, the interests of the public, as consumers of MVPD services, demand that competition be nurtured, so as to produce the benefits to consumers that only competition, as demonstrated by RCN's presence in the market, can bring. It is both necessary and appropriate, therefore, that the FCC act on these mandates and take further pro-active steps to ensure the continued vitality of broadband overbuilders as competitors in the MVPD arena. The alternative – a return to cable monopolies in a de-regulated MVPD world – is antithetical to the pro-competitive intent of the Telecommunications Act of 1996, and is contrary to the public interest.

II. ACCESS TO PROGRAMMING AND OTHER INPUTS

As RCN has long contended, and as the FCC itself has recognized, access to programming is crucial to the success of MVPD competition.[12] RCN applauds the FCC for determining, in 2002, that the existing program access rules prohibiting exclusive

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("USPIRG Report").

[11] FCC Releases Report on 2002 Cable Industry Prices, FCC News Release, July 8, 2003.

[12] Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Report and Order,17 FCC Rcd 12124, ¶59 (2002) ("Program Access Order"). "[T]he Order finds that access to vertically integrated programming continues to be necessary in order for competitive MVPDs to remain viable in the marketplace. An MVPD's ability to provide service that is competitive with an incumbent cable operator is significantly harmed if denied access to

agreements between cable operators and their affiliated programmers should be continued.[13] The FCC correctly concluded that, "where permitted, vertically integrated programmers will use foreclosure of programming to provide a competitive edge to their affiliated cable operators."[14] As a result, the FCC declined to eliminate the prohibition on exclusive contracts, finding that it was necessary to retain the prohibition until at least October 5, 2007, to "preserve and protect diversity in the distribution of video programming."[15] It has become apparent over the years, however, that the FCC's program access rules are insufficient to address the difficulties competitors continue to face in securing essential programming.

For example, Comcast has continued to use its leverage over vertically owned or controlled programming to deny competitors access to critical programming, particularly regional sports and news programming. Initially, Comcast denied RCN access to its SportsNet programming in Philadelphia altogether. It wasn't until Comcast faced the Department of Justice's review of Comcast's acquisition of Home Team Sports in the Washington, D.C. area that Comcast agreed to make the SportsNet programming available to RCN, and even then, only made it available to RCN on a short-term basis. The uncertainty inherent in such a short-term agreement, for a critical, non-substitutable, and expensive programming asset, is commercially untenable. After several years of negotiation, RCN can report that some progress on this issue

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'must have' vertically integrated programming for which there are no good substitutes."]

[13] *Id.* ¶ 59. Section 628(c)(5) of the Communications Act required the FCC to eliminate the prohibition on exclusive programming contracts on October 5, 2002, unless it found that such a prohibition was necessary to preserve competition. 47 U.S.C. § 548(c)(5).

[14] *Program Access Order, supra* n.13, ¶ 59.

[15] During the pendency of the AT&T–Comcast merger proceeding, RCN has been led to believe it would be allowed to carry NECN. Since the merger was approved, however, Comcast has

has been made. RCN is hopeful that it will be able to finalize a long-term agreement with Comcast for the SportsNet programming in the near future.

Another example of program access discrimination is in the Boston market, where Comcast (formerly AT&T) has refused to waive its exclusive rights to carry terrestrially-delivered New England Cable News ("NECN"), thereby denying RCN's subscribers access to this important local programming. Historically, Comcast representatives have used RCN's inability to access essential local programming as a selling point for Comcast with consumers.[16] Comcast's egregious actions not only impede RCN's ability to effectively compete, more importantly, they deny consumers the benefits of competition and access to the programming they demand.

The FCC has acknowledged the importance of certain "must have" programming, especially local sports programming, to the success of competitive MVPDs, and is aware that the program access rules do not provide adequate protection to competitors when it comes to regional programming. As has been clearly documented in the FCC's MVPD proceedings, "[D]espite the presence of the program access rules, lack of access to programming, especially sports programming, remains a significant barrier to entry and an impediment to the successful development of a competitive MVPD business."[17]

The inability of competitors to obtain access to critical programming is due in part to the terrestrial delivery loophole in the existing program access rules. Although the FCC recognizes

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denied RCN access to this programming.

[16] *Ninth Annual Report*, *supra* n.6, ¶141.

[17] In re the Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee, *Memorandum Opinion and Order*, 17 FCC Rcd 23246, ¶ 101 (2002) ("*AT&T-Comcast Merger*

this problem, it has clearly indicated that statutory limitations restrict its ability to enforce violations of its program access rules for terrestrially delivered programming. As the FCC stated:

> We recognize that access to certain local and regional programming can be important for alternative MVPDs to compete. As we recently concluded in our *Program Access Order*, we believe cable operators that are affiliated with programmers generally have the incentive and ability to secure exclusive distribution rights that prevent their MVPD competitors from gaining access to popular programming in which the cable operator has an interest. The program access rules prohibit such arrangements with respect to satellite-delivered programming, but not terrestrially delivered programming.[18]

However, based on RCN's experience with Cablevision's discriminatory actions in New York City, the FCC can, and should, more aggressively investigate and pursue allegations of intent to evade the program access rules through the terrestrial loophole. As the FCC is aware, RCN filed a complaint with the FCC against Cablevision on the basis that Cablevision deprived RCN of access to key overflow sports programming by revising its distribution system from satellite to terrestrial so as to preclude RCN's carriage of this important tier of programming.[19] The FCC ultimately dismissed the complaint on the grounds that RCN failed to show that Cablevision moved the programming from satellite to terrestrial distribution for the purpose of evading the program access rules.[20] In so ruling, however, the FCC also denied, over the dissent of Commissioner Tristani, RCN's

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Order") (emphasis added; internal citations omitted).

[18] *Id.* ¶ 101.

[19] Cablevision controls the programming rights for a majority of the local professional sports teams in New York, including the Yankees, Mets, Knicks and Rangers.

[20] *RCN Telecom Services of New York, Inc. v. Cablevision Systems Corp.*, 16 FCC Rcd 12048 (2001).

request for discovery to probe the issue of statutory evasion. This is one example of where the FCC could have taken positive action to address this issue, and yet declined to do so. Given the importance of this problem, and the limitations the FCC itself has recognized in addressing this issue, it must take full advantage of every opportunity it has to clarify and enforce its program access rules.

Significantly, the FCC has also found that regional clustering of cable systems can exacerbate the terrestrial loophole issue. The FCC has stated "we believe that clustering, accompanied by an increase in vertically integrated regional networks affiliated with cable MSOs that control system clusters, will increase the incentive of cable operators to practice anti-competitive foreclosure of access to vertically integrated programming."[21]

To address these issues, the FCC must take a pro-active and pro-competitive stance in applying its program access rules, and where necessary, seek legislative changes that will ensure competitors non-discriminatory access to critical programming under reasonable rates, terms and conditions. Insofar as the FCC believes it cannot close the terrestrial loophole, due to statutory language referencing only satellite-delivered programming, it is imperative that the FCC in its Tenth Annual Report on the status of MVPD competition inform Congress of the urgent need for legislation to permit expansion of the program access rules to close this anti-competitive gap in the law.

As technology evolves, the FCC must also be cognizant of the impact that discrimination in access to content will have on consumers' accessibility to next-generation services, such as video-on-demand ("VOD"). The FCC has recognized the

growing importance of these emerging technologies,[22] and, as such, it is essential that the FCC ensure that dominant providers are not permitted to engage in exclusive or discriminatory access to these services and related equipment.

The FCC should also give serious consideration to the need for legislation to extend the existing program access rules to prohibit exclusive agreements for unaffiliated programming. Given the enormous market power of the largest MSOs, this problem is not hypothetical. The FCC specifically found, in analyzing the AT&T-Comcast merger, that "The record demonstrates that AT&T and Comcast individually already have sufficient presence in their respective franchise areas to secure exclusive contracts for unaffiliated national, local and regional programming."[23] Obviously, this ability to preclude competitors' access to programming was in no way diminished by the merger of AT&T with Comcast to form the largest cable MSO.

III. PREDATORY AND DISCRIMINATORY PRICING BY INCUMBENTS

RCN and other overbuilders have expressed concern for some time regarding the predatory effect of discriminatory, secretive, and targeted discounts and promotions by cable operators that are employed against overbuilders in areas where cable competition has established a toehold.[24] RCN provided specific, documented evidence of these practices in connection with the AT&T-Comcast merger review proceeding.[25] For

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[21] *Program Access Order*, *supra* n.12, ¶ 47.

[22] Assessment of the Status of Competition in Markets for the Delivery of Video Programming, *Eighth Annual Report*, 17 FCC Rcd. 1244, ¶187 (2002).

[23] *AT&T-Comcast Merger Order, supra n.17, ¶ 108.*

[24] *Id.* ¶¶ 117-122.

[25] Petition of RCN Telecom Services, Inc., to Deny Applications or Condition Consent, AT&T/Comcast Merger, at 22, dated April 29, 2002, MB Dkt. No. 02-70. In Montgomery

example, in Pennsylvania, shortly before RCN entered the market, Comcast attempted to lock-in customers for 18-month contracts in exchange for lower prices. Currently, Comcast is offering RCN's existing and potential customers in the Philadelphia market significant discounts on bundled digital cable and premium programming and cable modem service (this bundle is being offered at $50/month) that it is not being offered to customers outside of the RCN territories in the Philadelphia market. Given that the industry's average monthly rate for digital cable service alone is $53 to $55, the anti-competitive impact of Comcast's bundled rate of $50 becomes self-evident.[26]

While lower cable rates are among the most important benefits to consumers that cable competition provides, discriminatory prices are not. It is clear that when the relatively small number of consumers that currently have access to the services of a competitive overbuilder enjoy artificially low rates, those rates are, necessarily, being subsidized by the exorbitant rates charged to consumers who have no cable choice. Furthermore, if such tactics by the incumbent cable operators succeed, the effect will be to eliminate nascent competition, with the result that there will be a return to monopoly cable markets and all of the ills that monopolies – now unregulated – imply, including higher cable rates.

In the Order approving the AT&T-Comcast merger, the Commission observed:

> Although the Applicants deny that they have engaged in predatory pricing behavior, their representations leave open the substantial possibility that the Applicants may well have engaged in questionable marketing tactics and targeted discounts designed to

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County, Maryland, Comcast offered Starpower customers win-back promotions and in Washington, D.C., offered discounts and free services. In New York, Time Warner adopted aggressive bulk discount plans for buildings targeted by RCN. *See also* USPIRG Report at 29, Table 8.

[26] FCC Report on Cable Industry Prices, MM Docket No. 92-266, FCC 03-136 (rel. July 8, 2003), at Tables 3 and 10.

> eliminate MVPD competition and that these practices ultimately may harm consumers. We also disagree with Applicants' claim that targeted discounts merely reflect healthy competition; in fact, although targeted pricing between and among established competitors of relatively equal market power may be pro-competitive, targeted pricing discounts by an established incumbent with dominant market power may be used to eliminate nascent competitors and stifle competitive entry.[27]

The FCC pledged at that time: "We will continue to monitor allegations of targeted pricing closely and address specific abuses on a case-by-case basis."[28] In the Merger decision, the Commission also cited to several pending complaints by overbuilders concerning the incumbents' pricing practices as a possible forum for addressing the issue. In reality, however, the FCC's decisions on this matter indicate that current statutes and rules limit a competitor's ability to seek relief at the FCC for such anti-competitive behavior. Although section 623 of the Communications Act, and section 76. 984 of the Commission's rules require geographic uniformity in pricing, such a requirement does not apply if the FCC finds the incumbent cable operator is subject to "effective competition" in a market, thereby deregulating the incumbent's rates.[29] The requirements for the finding of effective competition, however, do not automatically eliminate the incumbent operator's ability or incentive to engage in discriminatory and predatory pricing.[30] As demonstrated in the *Altrio* decision, an incumbent cable operator engaging in such

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[27] *AT&T-Comcast Merger Order*, *supra* n.17 ¶ 120.

[28] *Id.* ¶ 122.

[29] 47 U.S.C. § 553; 47 C.F.R. § 76.984.

[30] The test for a finding of effective competition includes the presence of DBS providers and local exchange carriers that provide comparable video programming in the cable service area. 47 U.S.C. 543(e)(1). As the FCC itself has pointed out, the presence of DBS competition has had no "statistically significant effect" on cable rates. *Ninth Annual Report*, *supra* n.6, ¶ 114.

discriminatory pricing need only obtain a finding of effective competition to avoid the consequences of its anti-competitive behavior.[31]

Having recognized the importance of the pricing problem, and its detrimental effect on nascent competition, the FCC must take action. If it is the case that the FCC believes it lacks statutory authority to prohibit the anti-competitive pricing practices described in the AT&T-Comcast proceeding, then it should so inform Congress, and should promote a legislative solution. The Commission noted that "Mounting consumer frustration regarding secretive pricing practices and the threat that such practices pose to competition in this market suggest . . . that regulatory intervention may be required either at the local, state, or federal level."[32] However, the pricing issue is not easily addressed on a jurisdiction-by-jurisdiction basis. Cable rates have been deregulated at all levels but the basic service tier, and even then there can be no basic tier rate regulation where the FCC has declared that effective competition exists. The establishment of uniform cable rates in both competitive and noncompetitive areas requires each local franchising authority to enact and enforce uniform rate ordinances. These local franchising authorities may or may not have the wherewithal to do so, and are likely to be influenced by the incumbents' market power in much the same way that programmers are.[33] Thus, a federal solution is necessary.

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[31] *Altrio Communications, Inc. v. Adelphia Communications Corporation*, 17 FCC Rcd 22955 (2002).

[32] *AT&T-Comcast Merger Order*, *supra* n. 17, ¶ 122.

[33] USPIRG notes that the cable incumbents have, and exert, enormous political power at every level of government, and have exhibited the ability to quash many local efforts to foster cable competition. USPIRG Report at 25.

IV. ADDITIONAL BARRIERS TO COMPETITION

A. Pole Attachment Problems

One of the pro-competitive steps that was legislated in the Telecommunications Act of 1996 was the amendment of section 224 of the Communications Act, which imposed additional conditions on utilities owning poles and compelled such owners to make their poles accessible to cable companies and to telecommunications companies under reasonable rates, terms and conditions.[34] RCN has found this legislation invaluable, but still has faced delays in building its system and has had to expend enormous resources and incur significant costs to seek enforcement of these requirements against those pole owners that deny RCN reasonable access to this essential infrastructure. Both Verizon of Massachusetts and Verizon of Pennsylvania failed to meet their statutory obligations to RCN with the result that the build-out of RCN's systems in those areas was materially delayed and the costs were significantly higher than they should have been. After much expense and effort in the form of litigation, RCN has been able to significantly improve the situation and currently has agreements with both Verizon entities. An even more serious problem arose in the Philadelphia area with respect to the poles of the local electric utility - PECO Energy Co. ("PECO"). RCN filed a formal complaint against PECO, which has been pending since 2001.[35] Although this delay has been distressing, RCN is pleased to report that, with the recent encouragement of the FCC's Enforcement Bureau, the case is expected to settle shortly.

RCN has had to devote substantial resources to gaining access to utility poles, particularly in respect to its Boston and Philadelphia area systems. Pole attachment proceedings sap financial and manpower resources, which could have been better utilized to provide

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[34] 47 U.S.C. § 224(e), 224(f)(1).

[35] *Supra* n.5.

competitive service choices to the public. This also illustrates that incumbents are ever ready to abuse their control over essential facilities to preserve their dominant position in the market or to prevent an incipient competitor from gaining a viable foothold. For these reasons, it is essential that the FCC take swift and immediate action on pole attachment complaints filed by competitors.[36] The FCC can also help discourage future abuses by pole owners by taking strong and decisive action in its pole attachment decisions, through a pro-competitive interpretation of its rules and the imposition of penalties on pole owners that violate section 224 and the Commission's rules.

B. Restrictions on Access To Wiring In Multiple Dwelling Units

Access to MDUs remains a serious barrier to entry. In prior years RCN has indicated that the Commission's cable inside wiring rules are of limited value because they apply only in instances where the incumbent does not own the existing wiring and has no legal right to remain on the premises. This remains true. In RCN's experience, incumbents virtually always claim to have such rights and are ready to litigate the matter through the local courts. In such circumstances, the newcomer finds it at best unappealing to pursue service to such an MDU because of the costs and ill-will litigation it would entail, and at worst, wholly impractical because of the substantial delay inherent in pursuing this course of relief.

RCN is pleased, however, that in the FCC's most recent order on its rules governing cable home wiring and home run wiring, the FCC finally ruled in favor of RCN's request that sheet rock be deemed "physically inaccessible" for purposes of defining the demarcation point in

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[36] RCN appreciates steps taken by the Enforcement Bureau to encourage early mediation of such disputes, and to clear the pending backlog of complaints. Such measures are essential to the effective implementation of section 224.

MDUs.[37] The result of this holding was to move the demarcation point in MDUs to a more accessible location, which has improved RCN's ability to install its network in MDUs. Thus, the largely aesthetic concerns of landlords that resulted in a formidable barrier to RCN's entry to MDUs have been overcome. A competitive choice may now be made more readily available to thousands of consumers across all RCN markets. The FCC must also continue, however, to evaluate its rules on wiring and access to MDUs to maximize consumer choice and ensure that competitors are not foreclosed from providing their services in all markets.

C. Problems with Line Cutting

Another obstacle to competition that RCN has experienced is the cutting of cable lines by the incumbent cable operator's technicians, which disrupts the cable, Internet and vital phone service of RCN's customers. In the Boston market, RCN has experienced at least 20 cases of Comcast technicians cutting RCN's cable lines and disabling services to RCN subscribers. Although Comcast has indicated that the line cuts were inadvertent, the frequency of the cuts and other evidence indicate otherwise.[38] RCN has demanded that Comcast investigate these incidents. Similar disruptions in service to the customers of RCN's affiliate Starpower have occurred in Montgomery County, Maryland. Since May 2003, Starpower has received over 10 customer complaints of disruption in Starpower service, with Starpower customers reporting that these disruptions occurred immediately following the appearance of Comcast agents near or on the customer's property. Upon investigation, Starpower has discovered that its equipment has

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[37] In the Matter of Telecommunications Services Inside Wiring, *First Order on Reconsideration and Second Report and Order*, 18 FCC Rcd 1342 (2003), on appeal, *National Cable & Telecommunications Association v. FCC*, Docket No. 03-1140 (D.C. Cir.); see also RCN Telecom Services, Inc.'s Petition for Special Relief, CSR 5311, filed September 23, 1998.

[38] Attached as Appendix B is an article addressing this issue, including an interview with a customer that observed Comcast in action.

been replaced with Comcast's drop tags and terminators. There is no reasonable explanation for such behavior, and sadly it reflects the lengths to which the incumbent cable operators will go to undercut competition and thwart the benefits of consumer choice.

V. CONCLUSION

In summary, RCN believes that the regulatory changes the FCC has undertaken over the past decade have encouraged and promoted fledging competition in the video programming market. It has been RCN's experience as a competitive provider that consumers want and benefit from a choice in cable providers. Congress and the FCC have stated unequivocally that such choice and the benefits of that choice can be realized through competition. In order for MVPD competition to flourish and for consumers to realize the benefits of such competition, however, the FCC must be vigilant and take a more pro-active role in developing policies aimed at eliminating the anti-competitive behavior and barriers to competition described herein.

Therefore, RCN urges the FCC to assertively seek regulatory change that will ensure that competitive overbuilders, such as RCN: (1) have access to critical video programming, especially regional sports programming; (2) are protected, or have some means for seeking relief from incumbent cable operators engaging in discriminatory and predatory pricing and other acts of anti-competitive behavior aimed at driving competitors out of the market; and (3) have reasonable and non-discriminatory access to essential poles, ducts, and conduit, as well as wiring in MDUs. The incumbent cable operators' vast economic resources, continued dominance in the MVPD market, increase in horizontal and vertical concentration in the market, and unabashed willingness to impede competition at every turn, makes it essential that the FCC use its broad powers under the Communications Act and its legislative influence to ensure that alternative service providers are afforded the opportunity to compete and consumers can enjoy the corresponding benefits of competition.

Respectfully submitted,

By: 

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September 11, 2003

APPENDIX A

RCN SERVICE CONNECTIONS

As of June 30, 2003

Voice	269,780
Video	430,454
Data	184,265
Subtotal Network Connections	884,499
Resale	13,022
Dial-Up	208,289
Total Service Connections	1,105,810
Long Distance	181,111
Marketable Homes	1,419,947

Source: http://www.rcn.com/corpinfo/earnings.php?id=167

APPENDIX B

NEWS ARTICLE

http://wbz4.com

Cable Wars

Apr 11, 2003 4:38 pm US/Eastern

Sparks are flying between two companies that compete for cable TV and Internet service customers in the Boston area.

Accusations that cable giant Comcast is deliberately cutting off service to RCN customers, could be the start of cable war.

WBZ's Consumer Editor Paula Lyons has the story.

RCN customer Betsey Harper says she saw a Comcast truck and technician working outside her house and on her property last Monday, but didn't think anything of it until she lost her Internet connection.

It was two days before RCN could get to her.

Betsey Harper, RCN Customer
"I operate a home based business. Being down for 48 hours is not a good thing."

Even worse? After looking at her cable box, RCN told her Comcast had cut her service. What's more, she's not alone.

Robert Sheehan, VP, RCN, INC.
"We've been dealing with this probably since March."

RCN's Vice President, Robert Sheehan, says service cuts like Betsey's first surfaced in Newton, but have now spread to 10 other communities, despite his efforts to resolve the problem with Comcast.

Robert Sheehan, VP, RCN, INC.
"The problem has not abated. If anything, it's gotten worse."

How does it happen?

In Betsey's case, the RCN technician told her a device, called a terminator, had been installed in her RCN cable box.

Betsey Harper, RCN Customer
"I was flabbergasted."

Are these incidents mistakes? RCN thought so at first but not now.

Robert Sheehan, VP, RCN, INC.
"Now it's gotten way beyond that."

Comcast denied our request for an interview instead, in a statement, called RCN's accusation "unwarranted and completely false."

Before Media One became Comcast, Betsey Harper was a customer and still has their box on her house. But why Comcast may have tampered with RCN's box she can only guess.

Betsey Harper, RCN Customer
"I think they're trying to win me back as a customer, but to do that by interrupting my service? I'm baffled."

RCN says it is continuing to negotiate with Comcast and hopes to be able to resolve this problem before it escalates further.

CERTIFICATE OF SERVICE

I, Kathy L. Cooper, hereby certify that on this 11th day of September, 2003, the foregoing Comments of RCN Corporation were filed electronically via the Internet to http://www.fcc.gov/e-file/ecfs.html, and a copy served via e-mail on the following:

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